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In the Supreme Court of the United States

OCTOBER TERM, 1976

ROY RATLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends (1) that the subsequent expungement of a previous state conviction exempted him from criminal liability under 18 U.S.C. App. 1202(a)(1), prohibiting felons from receiving firearms; (2) that the evidence did not show that the firearm he received was operable; and (3) that the jury should have been required to find specific intent.

After a jury trial in the United States District Court for the District of Kansas, petitioner was convicted of receiving a firearm in or affecting commerce after having been convicted of a felony, in violation of 18 U.S.C. App. 1202(a)(1). He was sentenced to imprisonment for a year and a day. The court of appeals affirmed (Pet. App. A).

1. The evidence, which is not in dispute, is summarized by the court of appeals (Pet. App. A2). Briefly, it showed

that on August 19, 1974, federal agents went to a pawnshop at which petitioner was employed to search for a suspect in an unrelated crime. During their investigation, they seized a firearm that petitioner had handed to his wife. The firearm had previously been shipped in interstate commerce.

Petitioner had been previously convicted of a state felony. Following the seizure of the firearm, however, he obtained an expungement of the conviction pursuant to Kansas law (Kans. Stat. Ann. §21-4617 (1974); see Pet. 3-4).

1. Petitioner contends that expungement of his felony conviction after the date of the offense (but prior to indictment) exempts him from the provisions of 18 U.S.C. App. 1202(a)(1). This contention is without merit.

The sanctions of 18 U.S.C. App. 1202(a) apply, *inter alia*, to "[a]ny person who (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony * * * ." An exemption is granted to felons "pardoned by the President of the United States or the chief executive of a State," provided that the felon is also expressly authorized to possess a firearm (18 U.S.C. App. 1203(2)). "By specifically providing that it would recognize only certain pardons, Congress indicated that it did not wish to recognize other means which the states might employ to expunge felony convictions or to restore civil rights." *United States* v. *Kelly*, 519 F. 2d 794, 796 (C.A. 8). Accord, *United States* v. *Potts*, 528 F. 2d 883 (C.A. 9) (*en banc*).[1]

[1]In *Potts*, the Ninth Circuit expressly overruled *United States* v. *Hoctor*, 487 F. 2d 270 (C.A. 9), on which petitioner solely relies to show a conflict in the circuits on this issue.

Furthermore, the expungement of petitioner's felony conviction occurred after the offense for which he was indicted. That expungement, therefore, did not remove petitioner from the coverage of Section 1202(a)(1). "The statutory provision was triggered by his status as a convicted felon, a status which did not change until the [expungement] was received." *United States* v. *Dameron*, 460 F. 2d 294, 295 (C.A. 5), certiorari denied, 409 U.S. 882.[2] For purposes of the statute, petitioner was a convicted felon on the date of the offense.

2. Contrary to petitioner's assertion (Pet. 13-14), the government was not required to prove that the firearm he received was then operable. See, *e.g.*, *United States* v. *Pleasant*, 469 F. 2d 1121, 1125 (C.A. 8). The statute, 18 U.S.C. App. 1202(c)(5), defines firearms to include:

> * * * any pistol or revolver *originally designed to be fired* by the use of a single hand and which is *designed to fire or capable of firing* fixed cartridge ammunition, or any other firearm *originally designed to be fired* by the use of a single hand. [Emphasis added.]

It was stipulated that the weapon seized from petitioner was a loaded revolver. As the court of appeals correctly noted, that revolver was "clearly designed to fire or capable of firing and is a firearm within the statutory definition" (Pet. App. A5).

3. Petitioner asserts (Pet. 14-15) that the trial court erroneously declined to give an instruction requiring proof of specific intent. The court of appeals correctly concluded, however, "that specific intent or knowledge

[2]*Dameron* involved a pardon granted after the offense was committed but prior to indictment.

is not an element of the crime of possessing firearms after having been convicted of a felony. *United States* v. *Thompson,* 518 F. 2d 534 (8th Cir.); *United States* v. *Powell,* 513 F. 2d 1249 (8th Cir.)" (Pet. App. A5). See also *United States* v. *Crow,* 439 F. 2d 1193 (C.A. 9), vacated and remanded on other grounds, 404 U.S. 1009; *United States* v. *Horton,* 503 F. 2d 810 (C.A. 7); *United States* v. *Thomas,* 484 F. 2d 909 (C.A. 6), certiorari denied, 415 U.S. 924.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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[3]There is no conflict among the circuits on this question. In *United States* v. *DeBartolo,* 482 F. 2d 312 (C.A. 1), upon which petitioner solely relies (Pet. 16), the court affirmed the use of an instruction that "the Government need prove that the defendant had knowledge only 'that the object involved in such transfer was a gun * * * '" and not that the defendant knew the gun was within the definition of 26 U.S.C. 5845. *Id.* at 313-314. This requirement is perfectly consistent with the position taken in the cases cited above and in the instant case. Compare *United States* v. *Freed,* 401 U.S. 601, 607-610.